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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN RIVERS and TOM LAMB (Dan P. Rivers as Executor of the Will of John Rivers, substituted in place and stead of John Rivers, deceased),
Petitioners,

v.

ROSENTHAL & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

May a private claim for damages for violations of the antifraud provisions of the Commodity Exchange Act be asserted in the Districts Courts?

II.

May a private claim for damages for violations of the registration requirements of the Commodity Exchange Act be asserted in the District Courts?

PARTIES TO THIS PROCEEDING

The party-plaintiffs to this proceeding are John Rivers and Tom Lamb (Dan P. Rivers as executor of the Will of John Rivers has been substituted in place and stead of John Rivers, deceased).

The party-defendants to this proceeding are Rosenthal & Company and Carl M. Tipton.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOHN RIVERS and TOM LAMB (Dan P. Rivers as Executor of the Will of John Rivers, substituted in place and stead of John Rivers, deceased),
Petitioners,

v.

ROSENTHAL & COMPANY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners John Rivers and Tom Lamb request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on December 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals (A-1) is not yet officially reported and it is unofficially reported at 2 Comm. Fut. L. Rep. (CCH) para. 21,128. The opinion of the District Court (A-44) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered December 16, 1980. (A-43) This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 4b, 4c(b) and 4k of the Commodity Exchange Act, as amended ("CEA") 7 U.S.C. §§6b, 6c(b), 6k (1976) (A-62, A-64, A-65); Commodity Futures Trading Commission ("CFTC") Reg. §32.9 (formerly CFTC Reg. §30.01), 41 Fed. Reg. 51817 (Nov. 24, 1976), 17 C.F.R. §32.9 (1978) (A-67); and CFTC Reg. §32.3 (b), 41 Fed. Reg. 51815 (Nov. 24, 1976), 17 C.F.R. §32.3(b) (1978) (A-66).

STATEMENT OF THE CASE

Petitioners, John Rivers and Tom Lamb, filed a complaint against Defendants Rosenthal & Company ("Rosenthal") and Carl M. Tipton ("Tipton"), an employee of Rosenthal, in September, 1979, in the United States District Court for the Southern District of Georgia. (A-47) The petitioners allege in their complaint that the defendants engaged in practices in connection with the offer and sale of commodity options in violation of the Commodity Exchange Act and anti-fraud and registration regulations adopted by the CFTC. The petitioners also asserted common law fraud and negligence claims. The jurisdiction of the District Court was based on federal questions, diversity of citizenship and pendent jurisdiction. (A-47, A-57)

The complaint alleges that the petitioners, resi-

dents of Wrens, Georgia, were inexperienced and unsophisticated in commodity option trading. Rosenthal is a commodity merchant which dealt in commodity options. Tipton was an employee of Rosenthal who engaged in the promotion and sale of commodity options to the petitioners. The petitioners received repeated unsolicited telephone calls from Tipton in an attempt to induce them to purchase certain commodity options through Rosenthal. (A-49) During the course of these telephone solicitations, Tipton falsely and fraudulently represented that the petitioners could not lose money in the options being offered because profits were guaranteed, that the options being offered would double or triple in value within a short period of time, and that Tipton was one of the top commodity brokers in the country whose customers had never lost money in commodity options. (A-50) The petitioners were not warned by Rosenthal or Tipton of the risks inherent in the trading of commodity options. (A-50) In reliance on Tipton's misrepresentations and omissions, the petitioners made substantial investments in various commodity options. By April, 1977, some of the option investments of the petitioners were in a highly profitable position. At that time, the petitioners informed Tipton that they were satisfied and ready to sell the options. However, Tipton insisted that the options not be sold. He represented that the value of the options was "locked in" and that the options could only increase in value. In reliance on these representations, the petitioners maintained most of their option positions, ultimately suffering out-of-pocket losses exceeding $100,000 (A-51 - A-52) During the course of the petitioners' dealings with Tipton, Tipton's application to register as an "Associat-

ed Person" was denied by the CFTC. Thereafter, he continued to service the petitioners' accounts with Rosenthal in violation of the CEA's registration requirements. (A-53 - A-54).

In November, 1978, Rosenthal and Tipton filed motions to dismiss the complaint under Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that the District Court lacked subject matter jurisdiction and that the complaint failed to state a claim. Specifically, Rosenthal and Tipton contended that the 1974 amendments to the CEA abolished the jurisdiction of the District Courts to hear private damage claims for violations of the CEA and established reparation proceedings before the CFTC as the exclusive forum for such actions. On December 28, 1978, the District Court entered an order denying the motions to dismiss and certifying the questions raised for immediate appeal. (A-44).

Rosenthal (but not Tipton) filed a petition with the Fifth Circuit Court of Appeals for leave to appeal from the District Court's order. That petition was granted by the Circuit Court on February 5, 1979. (A-46) On December 16, 1980, the Court of Appeals reversed the District Court's order insofar as it denied Rosenthal's Motion to Dismiss the petitioners' claims under the CEA and remanded the case to the District Court for resolution of the remaining claims. The Circuit Court panel concluded that the language and history of the CEA "do not provide any clear indication of congressional intent either to approve or deny an implied right of action" (A-1, A-43) and that in such a circumstance, the

Court was bound to conclude that no private right of action exists.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision in this case is in conflict with the decisions of other Federal Courts of Appeals.

The Court of Appeals' conclusion that there is no implied private right of action under the CEA which may be brought in the District Courts is in conflict with the decisions of every other Federal Court of Appeals to address the issue. Circuit Courts in *Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980), *petition for cert. filed*, No. 80-203 and *Leist v. Simplot*, Nos. 79-7402, 79-7464 and 79-7482 (2nd Cir. July 8, 1980), (2 Comm. Fut. L. Rep. (CCH) para. 21, 051), *cert. granted*, Nos. 80-757, 80-895, 80-936, concluded that a private right of action for damages may be maintained in the District Courts. The existence of such a private right of action has been assumed or treated as well-settled in at least three other Circuit Court decisions. See, e.g., *Case & Company, Inc. v. Chicago Board of Trade*, 523 F.2d 355, 360 (7th Cir. 1975); *Hirk v. Agri-Research Counsel*, 561 F.2d 96, 103-104 (7th Cir. 1977); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Goldman*, 593 F.2d 129, 134 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979). Still another Circuit Court has indicated approval of Judge Friendly's reasoning in *Leist. Wachovia Bank and Trust Company v. National Student Marketing Corp.*, (Fed. Sec. L. Rep. (CCH) [Current Binder] Para. 97,712 at p. 98, 763 (D.C. Cir. 1980). Appeals involving this question are now pending in *Alken v.*

Lerner and E. F. Hutton & Co., No. 80-1918 (3rd Cir.), *Kotz and Kolar, Inc. v. Bache, Halsey Stuart, Inc.* No. 79-3442 (9th Cir.) and *Fischer v. Rosenthal & Co.*, No. 80-1056 (5th Cir.).

A conflict also exists among the District Courts which have considered the question of whether a private right of action may be maintained. See cases cited in *Leist v. Simplot, supra*, Comm. Fut. L. Rep. (CCH) at p. 24,172, n. 19 and *Rivers v. Rosenthal & Co.*, n. 7 (A-5). But the uncertainty over the availability of a private right of action for damages in the District Courts goes beyond conflicting court decisions. The Circuit Court's opinion in this case conflicts with the position consistently taken by the agency charged with administering the CEA. See, e.g., *Discussion of Rules Relating to Reparation Proceedings*, 41 Fed. Reg. 3994 (Jan. 27, 1976); Statement Concerning Referrals of Private Litigation Under the Doctrine of Primary Jurisdiction, 41 Fed. Reg. 18471, CCH Comm. Fut. L. Rep., (CCH) [1975-77 Transfer Binder] para. 20,155, p. 20, 970-20, 971.

II. The Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court.

This Court recently granted the defendants' petition for certiorari in *Leist, supra. Leist* involves a private action for damages against several producers, commodity brokerage firms and a commodity exchange for alleged fraud and market manipulation with respect to the trading of futures contracts. A

petition for certiorari is now pending in *Curran, supra. Curran* involves allegations of fraud by a customer against his broker for fraud in the trading of futures contracts.

This case involves allegations of fraud by customers against their broker and its representative for fraud and for violations of the registration requirements of the CEA with respect to trading in commodity options. Unlike futures trading, trading in commodity options was largely unregulated prior to the 1974 amendments to the CEA. Fraud and other improper practices in the trading of commodity options were among the factors which led to the passage of the 1974 amendments to the CEA. Under the CEA, Congress granted the CFTC extensive authority to prohibit certain specified commodity option transactions and to develop a regulatory framework for trading in other commodity options. 7 U.S.C. §§2, 6c(b) (1976).

Congress attempted, through the 1974 amendments, "to establish a regulatory authority in the commodity field similar to the Securities and Exchange Commission and to give that authority a strong law which [would] enable it to regulate . . . in the public interest." Senate Comm. Rep. No. 93-1131, 3 U.S. Code Cong. & Admin. News p. 5960 (1974). Pursuant to this broad authority, the CFTC adopted regulations establishing registration requirements for persons involved in the solicitation, acceptance and supervision of commodity options sales as well as an anti-fraud regulation relating to commodity options sales. These regulations, especially the anti-fraud regulation, were patterned after

regulations previously adopted by the SEC with respect to securities transactions.

Despite the increased regulation of commodity options, the CFTC was forced on April 17, 1978, to issue a suspension of option sales to the general public due to widespread fraud and abuses being practiced by persons involved in the sale of options. CFTC Rule 32.11, effective June 1, 1978, 43 Fed. Reg. 16153 (April 17, 1978). These continued abuses prompted Congress to add Section 4c(c) to the Act further restricting the sale of commodity options. See, e.g., Remarks of Senator Huddelson, 124 Cong. Rec. No. 104, p-S10536 (July 12, 1978) and 7 U.S.C. §6c(c) (1979).

This history of abuse and the enormous size and importance of the commodity industry generally ("over 520 billion in trading volume in 1973 — more than double the volume of trading in all securities"; Remarks of Senator Clark, 120 Cong. Rec., Part 23, p-30463 (Sept. 9, 1974)) form the background against which the issues presented by this case must be considered. The conflict among the various Courts of Appeal has created confusion and uncertainty as to what remedies are available to customers who are the victims of fraud and other abuses. This uncertainty clearly serves to frustrate the efficient administration of the Act and the accomplishment of its very important "remedial" purposes. Under these circumstances, the issue of whether a private damage claim for violations of the CEA may be brought in the District Courts should be resolved by this Court.

III. The Court of Appeals decided this case in a way which conflicts with applicable decisions of this Court.

The Circuit Court based its conclusion that no private right of action may be asserted in the District Courts for violations of the CEA, primarily on the cases of *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979), in which this Court found no private right of action under the Investment Advisors Act of 1940, and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), in which this Court found no private right of action under §17(a) of the Securities Act of 1934.

The petitioners respectfully suggest that the Circuit Court misapplied *Transamerica* and *Touche Ross* and ignored the clear mandate of *Cannon v. University of Chicago*, 441 U.S. 677 (1979), in which this Court found an implied private right of action for violations of §901(a) of Title IX of the Education Amendments of 1972. The Court of Appeals failed to note the critical similarities between this case and *Cannon* and the critical distinctions between this case and *Transamerica* and *Touche Ross*, as outlined below:

1. The key provisions of the CEA at issue in this case were reenacted in 1974 substantially unchanged from prior provisions under which courts had unanimously held that there was an implied private right of action. Similarly, the key provisions in *Cannon* were modeled after provisions of another statute under which courts had repeatedly recognized an implied private right of action. The Court of Appeals

nevertheless held in this case that the 1974 amendments repealed this private right of action by implication. The Circuit Court relied on *Transamerica* and *Touche Ross* even though those cases involved original legislation and did not establish precedent or methodology for determining whether an existing implied remedy has been repealed by implication.

2. In the legislative history of the 1974 amendments to the CEA, there is significant evidence that Congress was aware that courts had found an implied private right of action under the readopted provisions of the CEA and that Congress intended to continue the remedy. See, *Leist*, *supra*, Comm. Fut. L. Rep. (CCH) p. 24,177-84. In commenting on similar evidence in *Cannon*, this Court was led to observe that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law . . ." 441 U.S. at 696-97. On the other hand, there was no evidence of a congressional intent to create an implied private right of action in *Transamerica* ("[o]n this question the legislative history is entirely silent," 444 U.S. at 18) and *Touche Ross* ("the legislative history . . . is entirely silent on the question," 442 U.S. at 571).

3. The 1974 amendments to the CEA were enacted at a time when courts liberally construed statutes to find implied private rights of action. *Leist*, *supra*, Comm. Fut. L. Rep. (CCH), p. 24, 167-24,170. Furthermore, this legislation was enacted against the background of a long history of decisions finding implied rights of action under analogous provisions of the federal securities laws. In reviewing similar circumstances in *Cannon*, this

Court observed that "our evaluation of congressional action . . . must take into account its contemporary legal context." 441 U.S. at 698-99. On the other hand, the legislation involved in *Transamerica* and *Touche Ross* was enacted before the widespread judicial recognition of implied private rights of action. See, *Leist*, *supra*, Comm. Fut. L. Rep. (CCH), p. 24, 185.

4. The statutes involved in *Cannon*, *Transamerica*, and *Touche Ross* all expressly provided for some private rights of action, but not those asserted in those cases. In contrast, the CEA expressly recognizes the right of private parties, like the petitioners, to recover damages for violations of the Act and expressly recognizes that such damage claims may be resolved in arbitration or administrative forums. 7 U.S.C. §§7(a)(11), 18 (1978). Moreover, as this Court observed in *Cannon*, "[t]he fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section." 441 U.S. at 711.

5. Unlike *Transamerica* and *Touche Ross*, the issue in this case is not whether Congress, which provided certain express *remedies*, "absentmindedly forgot to mention an implied private action." *Transamerica*, *supra*, 444 U.S. at 20. The question in this case is whether the jurisdiction to entertain private claims for violations of the Act extends to the District Courts, or whether Congress intended to limit such claims to the arbitration and administrative forums which it expressly sanctioned. This precise

question is answered by a savings clause included in the 1974 amendments which provides:

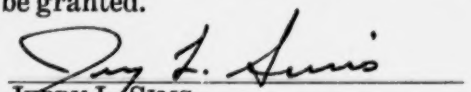
> "Nothing in this section shall supersede or limit the jurisdiction conferred on Courts of the United States or any state." 7 U.S.C. §2 (1978)

In view of the unanimous recognition of the availability of a private right of action in District Courts prior to the 1974 amendments, Congress would not have used general language in the jurisdictional savings clause if it had intended to withdraw the previously recognized jurisdiction of the District Courts to entertain such claims.

In summary, this Court has never refused to recognize an implied private right of action under circumstances like those present in this case. Moreover, the Court should be wary of finding a *sub silentio* withdrawal of District Court jurisdiction to entertain private damage claims for violations of a remedial statute. Such a finding would invite needless dysfunction in the remedial process by causing many legitimate claims to be lost simply because the wronged party failed to perceive an altogether silent and invisible jurisdictional retrenchment.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.



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